

Phone memo

Date/time: Friday, July 11, 2014, 1:50 pm CDT

Ken Westlake, Chief, NEPA Implementation Section, USEPA, Region 5

Call received and notes prepared by Ken Westlake. Call received from Daniel Bach, Attorney, Bauer and Bach law firm, Madison, Wisconsin (608-260-0294)

Bach represents Buzz Hardy, a land owner in the Waukesha area whose land is in the path of the two remaining alternatives for the West Waukesha Bypass project. Hardy owns upland forest and some fen wetlands. Hardy was calling to discuss the project and my letter of 5/7/14 to Ian Chidester of the Federal Highway Administration – Wisconsin Division (FHWA).

Hardy opposes both build alternatives under consideration by FHWA and the Wisconsin Department of Transportation (WDOT). He would prefer that no road be built through his property. Bach said that, if WDOT seeks to acquire some of Hardy's land, Hardy may have to litigate against WDOT to obtain what he would deem a fair value for his land.

I noted that only two build alternatives remain before FHWA/WDOT. One (Pebble Creek West alternative) would take acreage from the fen (which has legal protections as a Water of the US under Section 404 of the Clean Water Act) in order to spare most of an upland forest (which lacks permanent legal protections). The other alternative (Pebble Creek Far West alternative) would take much of the upland forest in order to spare the fen.

I explained the merger process under Section 404 and NEPA (National Environmental Policy Act). EPA, among other natural resources agencies, such as the Army Corps of Engineers (Corps), is a party to the merger process, intended to resolve issues during the NEPA environmental impact statement phase in order that those issues not be reopened during the 404 permit process. EPA was asked by FHWA/WDOT to concur on their proposed preferred alternative, Pebble Creek West. EPA's 5/7/14 letter concurred with the Pebble Creek West alternative only if certain mitigation measures were agreed to. I acknowledged that both the fen and the upland forest were valued natural areas, but indicated that EPA would not agree to permanent loss of the fen without the upland forest having permanent legal protections. We want a project that is protective of natural resources and permittable.

Bach noted that Hardy's upland forest was enrolled in the Wisconsin Department of Natural Resources's protected forestry program, and that taking an enrolled privately-owned forest out of this WDNR program would have adverse tax consequences, a disincentive to development. He agreed with me that the WDNR program is not a permanent protection against future development. He said that the City and County of Waukesha were pressuring Hardy to put his upland forest into conservancy status. Bach termed that "heavy-handed," and said that if Hardy were to put his forest in conservancy status, it would lose economic value and therefore, he would not get a fair price when WDOT later sought to acquire a portion of it. Bach speculated, "What if WDOT were to acquire "all of it" (that is, all of Hardy's property, both upland forest and fen)? I replied that my experience with FHWA and State DOTs is that they seek to limit acquisition to only as much land as is needed for a project. Bach complained that the City and

County are pushing Hardy on the conservancy approach, even before they know exactly where the road will go or how Hardy would be compensated for loss of land value.

I acknowledged that Hardy has a history of managing his upland forest as a natural area, which is admirable. However, EPA is concerned that the fen would be permanently impacted under the Pebble Creek West alternative and that the upland forest, if not permanently protected, could be developed now or many years from now, e.g., 20-40 years from now. Bach maintained that even if the upland forest were largely spared, it would essentially be undevelopable due to a lack of convenient access. I replied that access could potentially be added if someone sought to develop the remaining upland forest in the future.

I noted that if he and his client wish to discuss Section 404 permitting, then EPA's Wetlands Program and the Corps of Engineers (permitting agency) and FHWA/WDOT would need to be involved.